United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2617

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

THE LUPARAR, JOHN SHUTTLE, Editor of Luparar, CRAIG MURRAY, Individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

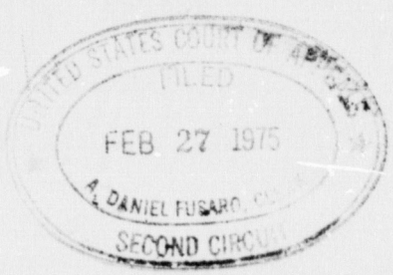
v.

R. KENT STONEMAN, Individually and as Commissioner of the Department of Corrections of the State of Vermont, MICHAEL MOEYKENS, Individually and as Acting Warden of the Vermont State Prison at Windsor, Vermont,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF OF DEFENDANTS-APPELLANTS



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as Commissioner of the Department
of Corrections of the State of Vermont,
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Acting Warden of the Vermont State
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Defendants-Appellants.

I. STATEMENT OF THE ISSUE FOR REVIEW

Did the District Court err in light of the state of the facts and the state of the law in granting Plaintiffs' request for summary judgment?

II. STATEMENT OF THE CASE

In November of 1971, without the assistance of attorneys or journalists, a set of policies and guidelines were produced for directing the operation of a prison newspaper at Vermont State Prison, Windsor. Appendix at p. 122 (Lines 18-21), p. 215-216. The idea of an inmate newspaper arose from a list of demands presented by the inmates following a riot at Windsor Prison during the period around September of 1971. The Commissioner of Corrections felt that it was a good idea to have such a newspaper and would encourage and help to fund and print the newspaper if there were guidelines that "everybody would agree on". Appendix at p. 82 (Lines 24-25), p. 83 (Lines 1-11). There were negotiations

with the inmates to establish guidelines for the Prison newspaper. Appendix at p. 17 (Lines 10-16), p. 26 (Lines 18-22). And guidelines for publishing were agreed upon. Appendix at p. 18 (Lines 1-4), p. 215-216. These guidelines for publishing the Prison newspaper were set up prior to the commencement of publication of The Luparar. Appendix at p. 35 (Lines 16-18).

The Facility agreed to fund and print the Prison newspaper and would provide up to $30.00 a month for that purpose. Appendix at p. 215. In addition, it was agreed that the Vermont Institutional Industries would provide professional assistance of their printer and would meet the costs for the paper used. Appendix at p. 18 (Lines 5-22). The Vermont Institutional Industries is a Division of the Department of Corrections. Appendix at p. 19 (Lines 9-14). As part of the agreement, guidelines concerning the publishing of the Prison newspaper were outlined, (Appendix at p.215-216) the important elements of these guidelines being:

1. All articles were to be approved by the editorial staff. It was the understanding of the Prison administration that the editorial staff would include both inmate and Prison administrators or officers.

2. Editorials were to attack issues and not personalities.

3. No inflammatory articles were to be published.

Included in the guidelines was a statement of the types of articles that were going to be published. That statement indicated that "The publication will publish such items as-program schedule,-movie schedules, progress reports on programs,-basically items of interest

to all concerned with corrections." Appendix at p. 216. With the agreement which included the establishment of these guidelines, The Luparar became the Prison newspaper.

The Luparar was published basically within the November 1971 guidelines without incident until October of 1972 when a new editor took charge of the newspaper. The previous editor, inmate James Clothey, had substantially reaffirmed his belief in the guidelines in July of 1972 indicating that the paper would "present opinions on issues, not personalities". Appendix at 39 (Lines 1-17). Up to this time it was fairly clear that the basic elements of the November 1971 guidelines were accepted by the inmates.

Beginning with the October 1972 issue, John Shuttle became editor of The Luparar since Mr. Clothey had escaped. The administration noticed a decided shift in the direction of the paper. Appendix at p. 79 (Lines 12-25), p. 80 (Lines 1-25), p. 81 (Lines 1-6), p. 84 (Lines 5-13 and 24-25), p. 85 (Lines 1-5, 13-17), p. 86 (Lines 13-20). It had become apparent that The Luparar was attacking personalities and publishing potentially libelous and highly inflammatory articles. The Commissioner of Corrections felt that these particular articles related to the security of the institution in the sense that they attacked the individuals who worked inside an institution which could have an effect of leading to confrontation between the staff and inmates. Appendix at p. 88 (Lines 11-18), p. 99 (Lines 7-13), p. 108 (Lines 10-14), p. 115 (Lines 15-20), p. 116 (Lines 8-20), p. 118 (Lines 1-6), p. 119 (Lines 3-15), p. 120 (Lines 8-15), p. 120 (Line 25), p. 121 (Lines 1-14). The administrators of the Prison met informally

with the inmates to try to avoid any future extensions of writing in these areas that were outside the guidelines for the newspapers, however, these informal meetings were ineffective, and the violation of the guidelines reached a critical point in the January 1973 issue of the paper.

The January issue of The Luparar was brought to the attention of the Commissioner of Corrections, R. Kent Stoneman. After reading articles that implied that the State's Attorney for Chittenden County was a "homosexual" (Appendix at p. 163); that inmates needed to "choke" information out of the Director of Education (Appendix at p. 164); that the warden is a "psychopath" (Appendix at p. 169); and a cartoon which displayed the Chief Security Officer as a "hopeless alcoholic" (Appendix at p. 195); referring to the Parole Board as "political mongrels of the old reich" (Appendix at p. 194); and Rev. Youngman as being a member of the "Klu-Klux Klan", (Appendix at p. 194), the Commissioner decided to prevent distribution of the January issue on Friday, January 5, 1973.

That same Friday, a written statement was provided to the staff of The Luparar indicating that the material violated the November 1971 guidelines. The focus of the violation was that, "This issue is far from the guidelines relating to issue and not personalities". Appendix at p. 202. After the meeting, the distribution of the January issue was halted, and the staff of The Luparar was informed that no further assistance would be provided until such time as the guidelines were met or new guidelines were agreed upon.

The following Monday, January 8, 1973, the Warden again met with

the inmate staff of The Luparar. At that meeting, he reaffirmed his position from the Friday afternoon meeting and told the inmates which articles were objectionable. Appendix at p. 10-20. He indicated no other issues of The Luparar would be mailed as presently constituted. The inmates informed the Warden that they would not have a paper which was subject to any censorship and that the staff would take the Department of Corrections to court. Since that time, the inmates have refused to negotiate for any new guidelines, even though the Department has offered a new set. Appendix at p. 66 (Lines 11-25), p. 203-207.

A Civil Rights action was filed April 3, 1973, in the United States District Court for the District of Vermont in the name of The Luparar, and by an inmate John Shuttle and by Craig Murray, a citizen of Vermont who allegedly is a subscriber of The Luparar by mail and who was at the time of the lawsuit the Director of the Vermont Chapter of the American Civil Liberties Union. Appendix at pp. 2-6. The Court below pursuant to Federal Rules of Civil Procedure 21 dropped The Lupararas a party plaintiff. Appendix at p. 330.

In their Complaint, Plaintiffs challenged the Department of Corrections' action that prevented distribution of the January issue of The Luparar outside the Prison alleging that the guidelines established for the publishing of the newspaper constituted an unconstitutional condition on the publication as well as violating Plaintiff Craig Murray's right to hear and receive information.

Plaintiffs attempted to maintain the suit as a class action, however, this was denied by the Court below. Appendix at p. 331. The United States District Court, Coffrin, J. granted a Motion for a Summary Judgment filed by Plaintiffs on June 9, 1974. Appendix at

p. 328. The date of the Order was September 30, 1975. On October 9, 1974, the Defendants filed a Motion Alternatively for a New Trial, Rehearing or Reargument of Motion for Summary Judgment which was denied by the Court. Appendix at p. 398. Attached to that Motion was an Affidavit of Commissioner Stoneman re-emphasizing his fears relative to a threat to security, order and rehabilitation at the Prison presented by the January 1973 edition of The Luparar. Appendix at pp. 361-363. The Court amended the Opinion and Order in part on November 21, 1974. Appendix at p. 395. Defendants filed a Notice of Appeal to this Court on November 27, 1974. Appendix at p. 399.

III. ARGUMENT

A. IN LIGHT OF THE STATE OF THE FACTS, THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT.

1. There is a genuine issue as to a material fact and thus a genuine issue remains for trial.

Rule 56(c) of Federal Rules of Civil Procedure sets forth when summary judgment will be granted:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any immaterial fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(e) of Federal Rules of Civil Procedure indicates:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his responses, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine issue for trial." (Advisory Committee Note to Rule 56(e), reprinted at 31 F.R.D. 647, 648).

Summary Judgment cannot be a substitute for a trial. It is a judicial search to determine whether genuine issues exist as to material facts. Homan Mfg. Co. v. Long, 242 F.2d 645 (7th Cir. 1957). Initially, in considering the issue of whether summary judgment was properly granted, the Court must decide whether a material fact is in issue and to that end there must be an understanding of what a material fact is. In American Manufacturer's Mutual Insurance Company v. American Broadcasting--Paramount Theatres, Inc., 388 F.2d 272, 279 (2d Cir. 1967), Kaufman, J. indicated that:

> ". . . .the law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue or fact is presented. As is so often true in the law, this is a matter of informed and proper reasoned judgment."

If the fact constitutes a legal defense or the fact affects the result of the action, it is material. Keehn v. Brady Transfer and Storage Co., 159 F.2d 383, 385 (7th Cir. 1947), cert. denied 331 U.S. 844.

In its Order the Court below indicated:

> ". . . .we hold that distribution of a prison newspaper to subscribers outside the prison may not be prevented by prison officials unless such distribution would be likely to interfere with the legitimate governmental interest of security, order, and rehabilitation discussed in Procunier v. Martinez, 42 U.S.L.W. at 4612." Appendix at p. 334.

The Court went on to indicate "we hold, therefore, that distribution of a prison newspaper within the prison is entitled to the same protections and subject to the same limitations as distribution outside of the prison." Appendix at p. 334-335. Assuming arguendo that the Court was correct in applying the standards of Procunier v. Martinez, 42 U.S.L.W. 4606 (U.S. April 29, 1974) to mass mailing of a prison newspaper, if in the depositions on file there is testimony that such

articles in a prison newspaper would be likely to interfere with the legitimate governmental interest of security, order and rehabilitation as prescribed by Procunier, then there would exist a genuine issue for trial. The dispute as to the above merely by "informed and proper reasoned judgment" would indicate that there is a material fact. A finding at trial that the government was validly protecting a legitimate governmental interest of security, order and rehabilitation would "affect the result of the action". The Court below must have determined that this was a material issue for it examined the articles in question and summarily found that they did not threaten security, order and rehabilitation. Appendix at p. 338.

Once it is decided what the material fact in question is, it has to be determined whether there is a genuine issue as to that fact. If there is a genuine issue as to a material fact, summary judgment must be denied. U.S. v. W.T. Grant Co., 345 U.S. 629 (1953).

> "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." Associated Press v. U.S., 1945, 65 S. Ct. 1416, 1418, 326 U.S. 1, 6, 89, L.Ed. 2013.

While some courts make 56(c) determinations on a case-by-case basis other courts have tried to develop a standard. The courts developing standards have indicated that where there is a genuine issue of fact existing, as long as there is the "slightest doubt" remaining as to the fact, summary judgment will not be granted. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); Doehler Metal Furniture Company v. U.S., 149 F.2d 130, 135 (2d Cir. 1945). No matter whether this test is followed or not the party opposing a summary judgment

motion should be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exists that justifies proceeding to trial. Doubts are to be decided against the person requesting a summary judgment. Adickes v. S.H. Kress and Company, 398 U.S. 144 (1970); Smith v. Pittsburg Gauge & Supply Company, 464 F.2d 870 (3d Cir. 1972); U.S. ex rel Jones v. Rundle, 453 F.2d 147 (3d Cir. 1971); Trotter v. Anderson, 417 F.2d 1191 (7th Cir. 1969); First National Bank of Cincinnati v. Pepper, 454 F.2d 626 (2d Cir. 1972).

It must be kept in mind that tne moving party has the burden of showing any absence of a material factual issue for trial. Adickes v. Kress and Company, supra. This burden is a heavy one on Plaintiffs to show there is no genuine issue of fact remaining for trial. Dolgow v. Anderson, 438 F.2d 825 (2d Cir. 1970); Kletschtka v. Driver, 411 F.2d 436 (2d Cir. 1969); Lemelson v. Ideal Toy Co., supra; American Manufacturers Mutual Insurance Co. v. Paramount Theatres Inc., supra; United States v. Farr & Co., 342 F.2d 383, 385 (2d Cir. 1965); Cross v. United States, 336 F.2d 431 (2d Cir. 1964). In Dolglow v. Anderson, the Second Circuit Court said, "a litigant has a right to a trial where there is the slightest doubt as to the facts." Such an admonition should be especially kept in mind when the matter deals with questions of motive, intent and subjective reactions as is the case here. Empire Electronics v. United States, 311 F.2d 175 (2d Cir. 1962); See also Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 and White Motor Co. v. United States, 372 U.S. 253. There is much more than a slight doubt in the matter before this Court and the Defendants have a right to a trial.

A review of the Deposition of Commissioner R. Kent Stoneman is sufficient to show that a material fact is genuinely in issue in

this matter. The Commissioner in referring to the January edition of The Luparar indicated that:

> "My primary concern was that this issue and some of the items contained in previous issues help create the kind of atmosphere where security was in danger and where rehabilitation was in danger. I refer, again, to my earlier comments about name calling and specific kinds of attacks. It sets apart two groups of people [guards and inmates] who have to be in touch with each other everyday and who can only become more polarized than ever with that going on". Appendix at p. 117 (Lines 24-25), p. 118 (Lines 1-6).

Elsewhere in the Deposition the Commissioner indicated that there was a possibility

> ". . . .in this kind of situation, for the comments being made to be so strong that they can lead to the physical acts taking place. I refer to that comment earlier about 'shocking the truth' out of someone. I think that could be literally interpreted by an inmate and could lead to such a confrontation." Appendix at p. 120 (Lines 10-15).

At another point in the Deposition, the Commissioner said:

> "I have a legal responsibility and obligation to be concerned about the lives and safety of the people there, inmates and staff, about the security of the institution, about morale and about programs for inmates. It is conceivable, although I don't know that, that had this issue come by itself in isolation and not part of a chain of criticisms that I might have allowed it in, but I don't know." Appendix at p. 116 (Lines 13-20).

It is true that the Commissioner in speaking about the Warden having been referred to as a "psychopath" admitted that this statement alone is unlikely to provoke a riot, however, he went on to say that combined with a whole series of other items in this issue and some earlier ones, there is a potential for creating the kind of disturbance that might lead to a riot. Appendix at p. 98 (Lines 7-13). Such articles present a real risk of confrontation between the staff and the inmates and such confrontation could lead to conceivably a riot situation. Appendix at p. 88 (Lines 11-18). With such indications from the head

of this Department, it becomes clear that the Court erred in granting summary judgment due to the material issue of fact in question. The article suggesting "we [inmates] should choke" information out of the Director of Education clearly exemplifies the Commissioner's fears. Appendix at p. 164.

That the Court possibly didn't peruse the Depositions and missed the above mentioned comments of Commissioner Stoneman may be the case. However, in an Affidavit attached to the Defendants' "Memorandum in Support of Motion For Reconsideration of Summary Judgment and Motion for Stay", the Commissioner made clear his feelings relative to the dangers to security, order and rehabilitation presented by the articles in the January edition of The Luparar:

> "In its Opinion in this case the Court found in effect that the publication within its four corners, does not present a threat to security, order and rehabilitation at the prison. I respectfully must take issue with this conclusion. Based on my experience as a correctional administrator, it is my opinion that such personal attacks on staff through a vehicle which is state subsidized are highly capable and undoubtedly would, if permitted to continue over a period of time, provoke acts of retaliation by guards against inmates and visa-versa. It is indeed difficult to state that a specific article in itself presents an immediate danger to order. However, that same article, when added to the normal frustrations and tensions of a prison atmosphere, may well create a very serious threat to security and order through retaliation at some indefinite time. The effects on rehabilitation by destroying inmate-staff communication are disastrous. I have a concern for the welfare for both staff and inmates at Windsor and other institutions in this Department. Tension between staff and inmates with the threat of retaliation is always a problem, however, this threat is greatly magnified when these attacks become public, and it is learned that the state is subsidizing them. In my opinion, these personal attacks create unacceptable levels of danger to all concerned." Appendix at pp. 362-363.

The Court below had a chance to rectify its error relative to a material issue of fact, however, it failed to do so. The Affidavit of Defendant Stoneman summarizes well his testimony in the Deposition quoted above. It is arguable that the Court below committed reversible

error by not granting Defendants' Motions for Reconsideration of Summary Judgment in light of that Affidavit. ". . . .when the factual allegations in the pleadings of a party opposing summary judgment are supported by affidavit or other evidentiary material, they must be taken as true in ruling on the motion." First National Bank of Cincinnati v. Pepper, supra at p. 629. See also Baynes v. Ossakow, 356 F. Supp. 386 (E.D. N.Y. 1972). The material issue of fact has been crystalized by the Affidavit and the crystal is so big that it would be hard to miss. The Court below has substituted its expertise in the field of prisons for that of the Commissioner, a man experienced as a correctional administrator who is involved in the daily activities of the Windsor Prison. The Court in fact looked at the articles involved and made a summary finding that they did not threaten security order and rehabilitation without looking at the particular atmosphere that existed at the prison at the time in question, an atmosphere that Defendant Stoneman would well be aware of. Defendants contend that the Court below in summarily ruling on the matter has committed reversible error.

2. The Court below erred in summarily trying the facts in granting summary judgment.

The Court below indicated that it had "examined the articles in question, and while it does not in any way approve of their tone and content, it does not find that they threaten the governmental interest of security, order, and rehabilitation, either individually or collectively." (Emphasis added.) Appendix at p. 338. The Court cannot summarily try the facts of a case on a Motion for a Summary Judgment. Lemelson v. Ideal Toy Corp., supra; Empire Electronics Co. v. U.S., supra; Preston v. United States Trust Company of New York,

394 F.2d 456, 460 (2d Cir. 1968); U.S. v. Curtiss Aeroplane, Co., 147 F.2d 639 (2d Cir. 1945).

On a Motion for Summary Judgment a Court cannot try the issues of fact but can only determine whether there are issues to be tried. American Manufacturers Mutual Insurance Co. v. American Broadcasting--Paramount Theatres, Inc., supra at p. 279; Cali v. Eastern Airlines Inc., 442 F.2d 65, 71 (2d Cir. 1971); Empire Electronics v. United States, supra at pp. 179-80; Soria v. Oxnard School District Board of Trustees, 488 F.2d 579, 586 (1973). When the Court finds an issue to be tried on a Motion for Summary Judgment, its function on that aspect of the case ends. Homan Mfg. Co. v. Long, supra. At p. 656 the Court in Homan noted, "The lower court cannot try out factual issues on a motion for summary judgment because once such an issue is found the court's function on that aspect of the case ends."

Nowhere in the Court's Opinion is there any discussion relative to the atmosphere at the Vermont Correctional Facility at Windsor, an atmosphere that must be considered in determining whether such articles do in fact create a threat to governmental interest of security, order and rehabilitation. The Court below recognized that First Amendment guarantees must be "applied in light of the special characteristics of the. . .environment." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969). See Appendix at p. 334. The Court had a problem with the "tone and content" of the articles. It is quite conceivable that in a tense prison situation those problems could take on much greater proportions. This was the feeling of the Commissioner of Corrections who is the authority on corrections in

the State of Vermont. Yet the Court felt it was in a position to substitute its feelings without gathering all the facts and viewpoints, possibily from experts other than the Commissioner. At a pretrial hearing held in Burlington on May 4, 1974, Defendants indicated they planned to call experts at trial. The Court below acted as the expert and presumed knowledge of the conditions at Windsor Prison.

The Court below upon receiving the articles in question may have felt that Defendant had a weak case and probably would lose at trial. If this is so, the Court clearly erred. The party moving for a summary judgment is not entitled to have it granted because it appears the opposing party is not likely to prevail at the trial. Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966). The Court in that case stated, "The fact that the trial court believed it unlikely that the plaintiff would prevail at trial is insufficient to authorize summary judgment." See also Goldwater v. Ginsburg, 261 F. Supp. 784 (D.C. 1966), certiorari denied, 396 U.S. 1049; Koleinimport "Rotterdam" N.V. v. Foreston Coal Export Corp., 283 F. Supp 184, 187 (S.D. N.Y. 1968). This is true even though both parties moved for summary judgment. In American Manufacturers Mutual Insurance Co. v. American Broadcasting--Paramount Theatres, Inc., supra, the court stated at p. 279:

> "the well settled rule is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed."

3. This is a matter involving complicated and important questions on an important public issue and summary judgment is not appropriate.[1/]

It is logical that where the only issue remaining is one of law, summary judgment is appropriate. However, before a court can properly apply the law, there must be an adequate factual basis for doing so:

> "Here we simply recognize that there are instances where summary judgment is too blunt a weapon with which to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case." Miller v. General Outdoor Advertising Company, 337 F.2d 944, 948 (2d Cir. 1964).

In Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969), the court said, "We recognize also that there may be some instances where summary judgment is too blunt a procedural device for deciding difficult cases."

The Court below has applied the law in a very unique and novel fashion to a prison which has a unique and dangerous atmosphere and the potential impact of this decision is great, too great it is contended to be dealt with by the route of a summary judgment order. In such

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1/ This case involves some of the most difficult conceptual questions that can arise in First Amendment litigation, including the doctrine of prior restraint, unconstitutional conditions, the existence of a constitutional right to hear and receive information, due process requirements in the context of a prison newspaper, and, of course, the special questions that arise when prisoners are trying to distribute a newspaper outside the facility instead of the usual situation involving receipt of mail. Memorandum Opposing Defendants' Motion To Dismiss and In Support of Plaintiffs' Motion For Summary Judgment, pp. 22-23.

a case, a more complete factual record is needed especially in light of a material issue of fact still to be resolved. White Motor Company v. United States, supra.

This decision could have a substantial impact upon prison systems within the United States and more particularly within the State of Vermont. The public has an interest in insuring that its prisons are secure and are in fact rehabilitating persons. The public has entrusted the keeping of these facilities to experts in the field, and the expert indicates that there is in fact a danger to security, order and rehabilitation caused by the printing of articles such that appeared in the January edition of The Luparar. With this in mind, granting of summary judgment on such a skeleton of facts is improper and a full hearing is desirable.

The United States Supreme Court in reversing a District Court decision granting a motion for summary judgment indicated:

> "We do not hold in the form tne controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clearcut and simple, present a treacherous record for deciding issues of far flung impor., from which this court should draw inferences with caution from complicated courses of legislation contracting and practice."
>
> Justice Jackson went on to say we consider it
>
> "the part of good judicial administration to withhold the decision of the ultimate question involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." Kennedy v. Silas Mason Company, 1948, 334 U.S. 249.

The issue here is not simple but complicated and has far flung import

and the Court below improvidently granted summary judgment. A like finding that the lower court's decision lacked thoroughness that should precede judgment of such importance may well reveal itself when evaluated in the context of larger prison systems where problems are magnified as to security and disruption. Lives are involved in prison confrontations between inmates and guards, and it can hardly be said that there can be anything of a higher magnitude than the life of a human being. Where danger to human life is involved, the matter should be determined on some basis other than summary judgment.

B. THE PLAINTIFFS IN ANY EVENT ARE NOT ENTITLED TO A JUDGMENT AS A MATTER OF LAW

1. The Court below erroneously adopted the standards of Procunier v. Martinez, a case dealing with the censorship of personal prisoner mail as the test the state must meet in regulating the content of a mass-mailed, state-supported prison newspaper.

It should be noted initially that the Complaint filed by Plaintiffs in this matter does not deal with the issue of in-prison distribution of a prison newspaper. Plaintiffs agree that this is not in issue.[2/] However, the Court below decided that in fact in-prison distribution as well as out-of-prison mass mailing of the prison newspaper was an issue. Although Defendants feel that they have in fact shown that a genuine material issue of fact exists and has been clearly presented so as to make the decision of the Court below in granting summary judgment one of error, it could be argued that Defendants would have

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2/ "With respect to the January 1973 issue of The Luparar, distribution within the prison is not in dispute." Memorandum Opposing Defendants' Motion to Dismiss and In Support of Plaintiffs' Motion For Summary Judgment at p. 2.

presented additional evidence to demonstrate that the genuine issue did exist, but did not do so because in-prison distribution of the newspaper was not an apparent issue.

a. Procunier did not extend the First Amendment rights of prisoners and in any event the court specifically excepted mass mailing from its decision.

The Supreme Court of the United States in Procunier v. Martinez, 42 U.S.L.W. 4606, 4610 (1974) dealt only with a particular means of communication between inmates and personal correspondents of those inmates. The Court did not deal with the constitutional rights of the inmate, and did not further extend the First Amendment rights of prisoners in the area of mail regulations, let alone extend First Amendment rights in the area of mass mailing of state-subsidized prison newspapers. The Supreme Court indicated specifically that it was excepting mass mailing from its decision indicating that "different considerations may come into play in the case of mass mailings." (Page 4610, Footnote 11). The Court below noted that very exception, however, extended the holding of Procunier to the prison newspaper and its distribution in and out of the prison.

The Supreme Court did not intend that its holding be carried over to prison newspapers. The fact that the Court felt it necessary to specifically except mass mailing certainly implies that the First Amendment rights of prisoners and outside readers relative to inmate publication could be more restricted. The Court did indicate that it intimated no view on that point (Page 4610, Footnote 11), however, if the Court did not mean to say that more stringent standards could apply, then there was no reason at all for specifically excepting the mass mailing situation. The implication is clearly there.

b. The Court below failed to evaluate any "different considerations that govern mass mailing" in reaching its decision to apply Procunier to these facts.

The Luparar was a large scale publication with up to 500 copies printed (Appendix at p. 22, Lines 8-12), and was intended for mass mailing. Appendix at p. 25, Lines 1-3. The Court below, if it was going to extend Procunier to cover such a mailing should have evaluated whether there were any "different considerations that govern mass mailing" and given them careful consideration. The Court did not do so. That the Supreme Court of the United States would specifically except mass mailing if it did not have reasons to do so and for the Court below to apply that case specifically to a mass mailing situation seems ludicrous. What those special considerations the Supreme Court had in mind are not revealed, however, considerations of the special atmosphere of a prison and the events and conditions of Windsor Prison at the time of the printing of the January 1973 edition of The Luparar would appear to be relevant considerations that might specifically relate to mass mailing. Articles that appear in inmate newspapers having substantially wider circulation than a private mailing, and those that make sharp attacks on individuals working with the inmates are likely to create problems. In Paka v. Manson, 16 Cr. L. 2256 (D.C. Conn. 11/22/74), Connecticut prison officials concerned that the formation of a prisoner union would create a danger to the prison's security refused to allow the formation of such a union. The Court indicated the rights of the prisoners were outweighed by the state's interest in maintaining order. One issue in the case involved the restriction against any communication whatsoever regarding proposals

to organize the union. The court noted at page 2257 that, ". . . . I reject the defendant's position that if the inmates have no right to associate as a functioning union they should not have the right even to communicate with counsel about it." The court rejected the prison's argument that allowing literature in regarding the union, without the possibility of the union being formed, would lead to a strong psychological set-back adversely affecting the morale of the entire prison. The Court took a view relative to mass distribution of such literature strikingly similar to the view of the prison officials in the matter now before this Court.

> "However, stencils or multiple copies are obviously intended for distribution among inmates within the prison. This fact raises much more forcibly the risk of agitation and unrest that prison administrators may legitimately seek to combat. Therefore there were no Constitutional violations in the prison's decision to confiscate the stencils and multiple copies of union materials." (Page 2257)

Going public with personal attacks is more likely to set apart the inmates and the guards who are in touch with each other daily and who could become more polarized because of tne public attacks on their personalities. In the private mailing situation that old saying "what you don't know won't hurt you" would apply. However, a public libelous attack which by its nature is injurious to the reputation of another is "fighting material" and in a tense prison setting is "something that is known that will hurt someone". Such public attacks can spur a person into committing a violent act. In this regard it has to be kept in mind that,

> "The association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings. Moreover, a great many of the inmates of correctional

> institutions are dangerous men, and those charged with supervising them understandably have less confidence in their ability to adapt peacefully to changed social conditions than one would have in men who reside in society at large. The operation of penal institutions is a highly specialized endeavor, and the sober judgment of experienced correctional personnel deserves the most careful consideration by the courts. Edwards v. Sard, 250 F. Supp. 977 (D.C. 1966).

It is true that the Court in Procunier allowed prisoners to make disparaging and critical remarks about prison personnel in private correspondence, but this is not likely to cause confrontation.

When evaluated in the context of a larger prison system, the problems are magnified as to security and disruption. It is true that Procunier involved a large prison system, but it is also true that the Court specifically excepted mass mailings from its Order. In Procunier the appellants contended

> "that statements that 'magnify grievances' or 'unduly complain' are censored 'as a precaution against flash riots and in the furtherance of inmate rehabilitation. . .' But they do not suggest how the magnification of grievances or undue complaining, which presumably occur in out going letters, could possibly lead to flash riots, nor do they specify what contribution the suppression of complaints makes to the rehabilitation of criminals."

There are valid considerations that distinguish mass mailing from private communications and the considerations presented in this matter should dictate a different result.

Another consideration that possibly was in the mind of the Supreme Court in Procunier was the possibility of libel suits in a mass mailing situation. The administration feared such possibilities. Appendix at p. 89 (Lines 22-25), p. 90 (Lines 1-3) and p. 108 (Lines 15-23). This would not be a problem for the state in the case of private inmate personal correspondence to another individual outside of prison. However, in the situation of a state-supported, state-printed prison

newspaper, printed on state materials in a state facility, a problem of liability for publishing defamation could be created. In such an action, it would be difficult indeed for the state to defend against third parties who could prove that the state recklessly ignored and even subsidized a publication it knew to be libelous. There was indication that at least one prominent public official had suggested a lawsuit, however, no lawsuit was actually brought. Appendix at p. 50 (Lines 18-22).

It has been suggested that a disclaimer might avoid liability of the state. Bazaar v. Fortune Society, 489 F.2d 225, 226. This suggestion is not without problems. The law of disclaimer is far from settled, and there is good cause to believe that an ineffective tongue-in-cheek disclaimer of materials known or suspected to be libelous would be of little value to the state in defending a lawsuit on the defamation. 50 Am. Jur. 2d, Libel and Slander 345. Defendants could be forced to undergo the expense of numerous lawsuits while they attempt to establish that the disclaimer should be effective to insulate them from liability because they are relatively powerless to control the content of the publication. See for example, a similar situation presented in Farmers Educational and Co-Op Union v. WDAY, Inc., 360 U.S. 525. A disclaimer is no guarantee of immunity from liability, and the fear of such liability is a valid consideration. It is worthy to note that a newspaper in the private sector would most probably have nothing to do with the printing of such materials that appeared in the January 1973 edition of The Luparar because of their libelous content. Just because the state is involved here, why should it have

to do what no others would?

The above mentioned considerations may not be the only ones the Supreme Court could have had in mind in the mass mailing situation. We should not be bound by standards that the court set up for a very limited situation.

2. The Court below mistakenly relied on "school newspaper cases" in reaching its decision.

The Court below used an analogy to college newspapers in reaching the conclusion that once the state has permitted the publishing of a newspaper in a prison, regardless of its financial support to that paper and regardless of the fact that it is printed on state-owned equipment in a state penal institution on materials supplied by the state, it cannot terminate such publication unless one of three enunciated government interests are met. In this the court erred.

a. A college campus is not similar to a prison and a college newspaper for purposes of the Constitution is not equivalent to a prison newspaper.

One of the main purposes of a college campus is to promote the free flow and exchange of ideas. The campus itself is a marketplace of ideas, and the colleges, especially of late, seem to have adopted the philosophy that almost any idea can be expressed. The student is to be exposed to numerous ideas and can pick and choose and develop hopefully into a responsible citizen of the United States. College newspapers are important media for transmitting this flow and exchange of ideas. This free flow and exchange of ideas is one of the main purposes for the existence of a college campus.

"Because of the potentially great social value of a free student voice in an age of student awareness and unrest, it would be incon-

sistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate. Power to prescribe classroom curricula in state universities may not be transferred to areas not designed to be part of the curriculum." Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass 1970).

The existence of a prison is for reasons much different than those of a college campus. In Wolff v. McDonnell, 15 Cr. L. Rptr. 3304, the United States Supreme Court, when discussing reasons for limiting due process in prison disciplinary matters, painted a true portrait of life in prison which defendants maintain bears little resemblance to a college campus.

"A closed, tightly controlled environment peopled by those who have chosen to violate the criminal law, and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to obtain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment and despair are commonplace." Id. at 3311.

See also Edwards v. Sard, supra.

Mr. Justice White in Wolff went on to indicate that

"It is against this background that we must make our consitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not so paramount." Id. at 3311.

It is reasonable that editorial control of a prison newspaper, like prison discipline, might well be a desirable feature in promoting the legitimate "correctional goal of modifying behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released." Id. at 3311.

Populated by numerous people who have and still regularly exhibit

violent actions, the prison atmosphere of possible retaliation is more than just a theoretical possibility, unlike a college campus. What better way is there to trigger deep emotions and promote violent reaction than to permit personal attacks in an unregulated prison newspaper. A prison is not a college campus and given a prison's specially charged atmosphere, the effects on prisoner and guard safety by a state-funded, unregulated prison newspaper is far-reaching and dangerous.

3. The Defendants were under no obligation to provide inmates with a state-subsidized newspaper. In choosing to do so, the Defendants were justified in enforcing agreed upon guidelines that were formulated before the newspaper was first published.

a. The Defendants were under no obligation to provide inmates with a state-subsidized newspaper.

The Court below indicated that "The state is not required to establish or support an inmate newspaper, and once it does so, it can withdraw its approval or support for any reason, except those impermissible under the First Amendment". Appendix at p. 335. Plaintiffs as well admit that the State is not under an obligation to provide inmates with such a newspaper.3/

b. The inmates agreed upon the guidelines prior to the Department permitting publishing of the newspaper.

As indicated in the Statement of the Case, the establishment of a prison newspaper at Windsor resulted from a list of demands arising

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3/ "At the outset, plaintiffs wish to make clear that they are not arguing that a state corrections department has an affirmative obligation to provide inmates with a newspaper, subsidized by the state." Memorandum Opposing Defendants' Motion to Dismiss and In Support of Plaintiffs' Motion For Summary Judgment at pp. 1-2.

out of a prison riot. The Commissioner of Corrections felt that it was a good idea and would encourage and help to fund and print the newspaper if there were guidelines that "everybody would agree on". Such an agreement was reached relative to funding, and guidelines for publishing were established prior to the commencement of The Luparar. At various times the guidelines were reaffirmed by the inmates.

The state is not obliged to establish or support an inmate newspaper. Appendix at p. 335. Once the state has been persuaded to support such a paper because the inmates agree to publish the paper subject to various guidelines which the administration feels are reasonable and are necessary to avoid problems between guards and inmates as well as for other reasons, should the inmates then be able to challenge the guidelines and operate the newspaper free of such guidelines? The inmates should be bound by this agreement. This is in reality a question of contract law. The prison agreed to permit the paper to be published and would fund and print it and the inmates would develop the paper within specific agreed upon guidelines. The state was under no consitutitional or other legal requirement to provide a forum for inmates to present issues, let alone attack personalities and the Department was justified in their actions when the inmates breached that contract.

It is not illogical to assume that had no guidelines been agreed upon, the Department of Corrections would have chosen not to permit the newspaper to be printed. The case of Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973) cited by the Court below for the principle that once the state establishes or supports an inmate newspaper it can

withdraw its approval or support for any reason except those not permissible under the First Amendment, involved a school newspaper case. The establishment of that paper was not predicated on an agreement between the editorial staff, and the school not to attack personalities. In fact the article that was objected to in that case spoke to an "issue", that being the ". . . .rapidly growing white population. . . ." on a predominantly black campus. In that case the president of the university disapproved of the editorial content and indicated in a letter noted at page 459 that, "In my view the September 16 issues of the Campus Echo does not meet standard journalistic criteria nor does it represent fairly the full spectrum of views on this campus." In the matter now before the Court the question is not one of arbitrarily deciding that an issue does or does not meet "standard journalistic criteria" whatever that may be, but of whether there has been a violation of agreed upon guidelines. In Antonelli v. Hammond, supra, also cited by the Court below, there was also a lack of agreed upon standards. "No guidelines of acceptability were established. . . ." (p. 1333). Here we have guidelines agreed upon by inmates and staff, and the inmates want to back away from their part of the agreement and yet enforce the Department's portion. It seems only proper to place the parties back in the position they were before the negotiations. The Department should be able to decide afresh whether it wishes to establish or support a prison newspaper. Equitable principles would seem to dictate such a result.

It is undisputed between the parties that the guidelines were

violated by attacks on personalities.[4] There is no question that calling a person a "psychopath" is an attack on a personality. Now the question is, what is the remedy?

Finally, it needs to be noted that the state has not put a condition on an absolute constitutional right. Here is a case where there was no right to have a newspaper and the state in good faith negotiated and permitted the establishment of the paper. The reasonable condition in such a situation should be enforceable. The idea that persons can't contract away constitutional rights is false. People do so daily with the government in any number of instances, for example enlisting in the military, wearing postal uniforms, etc. and the state can surely put a burden on an individual's constitutional rights in various situations, for example in the parole situation where the parolee may be prevented from leaving the jurisdiction or from frequenting a pool hall. Hyser v. Reed, 318 F.2d 225, 239 (C.A. D.C. 1963). While these conditions could not be imposed on a totally free citizen, it establishes the principle that the state can validly put reasonable guidelines on individuals that infringe on their constitutional rights. It is agreeable that to permit such conditions to be violated is not conducive to rehabilitation and bosters dishonesty in dealing.

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[4] "It is also undisputed by either of the parties that the January 1973 issue was suppressed because it violated the guidelines against attacking personalities." Memorandum Opposing Defendants' Motion to Dismiss and In Support of Plaintiffs' Motion For Summary Judgment, p. 14.

c. Control of the distribution of a prison newspaper is a matter of internal prison management and the Court should defer to the expertise of prison administration in such situations. This is especially so where there are alternate means of communication which lessen any impact upon claimed First Amendment rights.

As the Court below recognized, the internal management of prisons or correctional institutions is vested in and rests with the prison authorities and administration of the prison and overall operations are not subject to court supervision or control.

> "Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. . . . Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptable of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Procunier v. Martinez, supra at p. 4609.

The rationale behind this is that allowing judicial review of administrative decisions would substantially impair the ability of prison officials to carry out the purposes of the penal system. Because prison officials are responsible for the security of the prison and the safety of the population, they must have wide discretion in governing the prison population.

The Commissioner of Corrections is pursuant to 28 V.S.A. §102(c)(1)(5)(6) authorized to make regulations, to maintain discipline and control of correctional facilities, and to maintain security, safety, order at the correctional facilities. It is Defendants' contention that

this care revolves around the power to regulate the behavior of prisoners and the enforcement of an agreement on the guidelines of The Luparar is an extension of that power.

In a case dealing directly with the question of censorship of a prison newspaper and its relation to internal prison management, the court in Jones v. Rouse, 341 F. Supp. 1292, 1294 (N.D. Fla. 1972) maintained:

> "The determination of which prisoner-penned articles will be circulated throughout the prison population via an inmate periodical is clearly a matter of prison administration with the discretion of state authorities.

That "discretion" of state authorities is exactly what was exercised when the November 1971 guidelines were instituted and later enforced.

Just to give lip service to the principle that internal management of prisons rests in the hands of prison administrators is not sufficient.

> "[I]n the area of state prisons, the federal courts should refuse to interfere with internal state prison administration except in the most extreme cases involving a shocking deprivation of fundamental rights!" Baldwin v. Smith, 446 F2d 1043, 1044 (2d Cir. 1971).

No such shocking deprivation of fundamental rights is present here and in light of alternate means of communication with the general public any impact upon a claimed First Amendment right is clearly and greatly lessened.

The Department of Corrections provides Plaintiff with several means of expression and communication with the general public. The Plaintiffs are free to correspond with anyone they please, including newspapers. They are free to write manuscripts for publication and to seek independent publishers for their works. They are permitted to send and receive letters and receive published materials from outside

sources within broadly drawn guidelines. Appendix at p. 208. There is a very liberal visitation policy. Appendix at p. 321. They may use the telephone. Appendix at p. 325. Therefore, the Plaintiffs possess ample opportunity to utilize any guaranteed right of expression they feel they have. Through these means the Plaintiffs who claim a "right" to hear views from the prison have ample opportunity to do so.

Having provided adequate means of expression, the Department of Corrections maintains they are under no duty to continue to subsidize this inmate-run newspaper.

Two similar areas of jurisprudence involving prisoners' rights support Defendants' position that this costly method of expression Plaintiffs demand is not one that is guaranteed to them. The first is the area of religious freedom, which has been gaining increasing acceptance by the courts as an area of inmate protected rights.

> "The requirement that a state interpose no unreasonable barriers to the free exercise of an inmate's religion cannot be equated with the suggestion that the state has an affirmative duty to provide, furnish, or supply every inmate with a clergyman or religious services of his choice." Gittlemacker v. Prasse, 428 F.2d 1 at 4 (3rd Cir. 1970).

The Third Circuit has recognized that the protected right of religious expression fails to demand an affirmative obligation of the state to provide inmates with all and any means of expression.

The courts have reached the same conclusion when speaking of the right to counsel.

> "By offering to appoint counsel the government has fully satisfied the requirement. . . .that prisoners may not be denied effective access to the courts. Neither the government nor the respondent is required to allow prisoners to pick and choose the means of access most convenient to them, irrespective of the burden this places on prison administration, expense, and discipline. Lee v. Stynchcombe, 347 F. Supp. 1076 at 1080 (N.D. Ga. 1972).

The areas of the right of access to the courts and the freedom of religious expression are well founded constitutional protections. However, such protections in the prison context fail to demand that the State provide prisoners all possible means of employing those rights. In the area of freedom of expression, the Defendants maintain that the same is equally true.

Having provided several effective means of both receiving and expressing inmate views, the Defendants believe they are under no constitutional obligation to fund and support a prison newspaper. Existing methods of communication are sufficient to give inmates a fair opportunity to present facts, opinions and arguments on any matter relating to their confinement. In Pell v. Procunier, 15 Cr. L. 3202, the United States Supreme Court at page 3204 indicated:

> "In order properly to evaluate the constitutionality. . . . we think that the regulation cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison."

The court went on and noted that:

> "So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, 'prison officials must be accorded great latitude.'" Id. at 3204.

> "Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation." Id. at 3205.

In Paka v. Manson, supra, the court noted at page 2257:

> "In evaluating whether the seriousness of the deprivation of First

> Amendment rights suffered here invokes these nonabsolute constitutional protections, the court must heed the teaching that Pell drew from Kleindienst v. Mandel, 408 U.S. 753, 765 (1972); where restraints on rights of prisoners to communicate with each other are involved, a court must 'regard the available' alternative means of [communication]***[as] a relevant factor' in a case such as this***."

Where, as in this case, the administration agrees to give support to an inmate newspaper, it may be subject to reasonable conditions. The prison administrator is the one who initially controls whether a newspaper may be published and makes available the specific resources necessary to make the publication possible. Working as an agent of the state, he is not restrained from placing controls over the content of what is published in the paper. That authority to impose conditions for the publishing of The Luparar, even if the conditions had not been agreed upon, is a legitimate exercise of state power.

The United States Supreme Court has had occasion to consider the restraints placed by the Federal Communication Commission on broadcasters over assigned frequencies. The Commission made it a condition in the assignment of frequencies (a state controlled function similar to providing funds for a newspaper) that in the event personal attacks or political editorials are made, free reply time will be made available. Broadcasters have tried to maintain that once the frequency was assigned, they had the right to use their allotted frequencies to broadcast whatever they chose. (The similarity with the Plaintiffs' contention that they be free to distribute the January issue without any prior restraint once the privilege to print has been given is striking.) The court rejected that claim and upheld the right of the government to deny a station a license because it violated the F.C.C. standards.

In so doing, it explicitly maintained that denying a license for those reasons was not a denial of free speech. Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 (1969).

The status of private newspapers in controlling their content also provides considerable illumination in this area. The publishers of newspapers have the power to control article content, editorial comments, and advertising that appear in their papers. The area of that discretion that has gained the most intense attention is the control of advertising by papers. In a case where the Chicago Tribune rejected a paid editorial because its content ran contrary to the paper's interest, the Seventh Circuit maintained that "[w]e glean nothing (that maintains that) advertising pages may be pressed into service against the publisher's will". Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune Company, 455 F.2d 470 at 478 (7th Cir. 1970).5/

Where the State provides the funds and facilities for publishing a paper, it should not be required to have the pages of the paper "pressed into service against" its "will" either. Content regulation by those controlling the means of production of communication facilities is as clearly recognized as a legitimate exercise of authority. State

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5/ See also, Mid-West Elec. Coop. v. West Texas Chamber of Commerce, 369 S.W. 2d 842 at 843 where they maintain that:

"The publishers of newspapers or magazines are generally under no obligation to accept advertising from any and all who apply for its publication, but are free to deal or decline to contract with whom they please." (Cit. omitted.)

officials who permit the publishing of a prison newspaper on state equipment with state funds should legitimately have that same authority.

IV. CONCLUSION

For all of the above reasons, Defendants submit that there is a material issue of fact remaining for trial and in addition Plaintiffs were not entitled to judgment as a matter of law, therefore the court erred in granting summary judgment and Defendants request this Court to remand for further consideration by the District Court

Dated at Montpelier, Vermont, this 26th day of February, 1975.

Respectfully submitted

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE LUPARAR, JOHN SHUTTLE, Editor of Luparar, CRAIG MURRAY, Individually and on behalf of all others similarly situated,	)	
Plaintiffs-Appellees,	)	
v.	)	
	)	Docket No. 74-2617
R. KENT STONEMAN, Individually and as Commissioner of the Department of Corrections of the State of Vermont, MICHAEL MOEYKENS, Individually and as Acting Warden of the Vermont State Prison at Windsor, Vermont,	)	
Defendants-Appellants.	)	

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of February, 1975, I served a copy of the above Defendants-Appellants' Brief, with a copy of this Certificate appended thereto, on the Plaintiffs-Appellees, in this matter by mailing a true conformed copy thereof in a sealed envelope, first-class postage prepaid to Richard S. Kohn, Esq., American Civil Liberties Union, Inc., 43 State Street, Montpelier, Vermont and Paul Berch, Esq., South Pomfret, Vermont 05067.

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